



WISCONSIN LEGISLATIVE COUNCIL

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TO: SENATOR JENNIFER SHILLING

FROM: Jessica E. Ozalp, Staff Attorney *JO*

RE: Provisions of 2015 Assembly Bill 1, Relating to a School Review System

DATE: January 9, 2015

This memorandum, prepared at your request, describes Assembly Bill 1 ("the bill"), relating to a school review system. The bill creates an Academic Review Board (ARB) attached to the Department of Public Instruction (DPI). The bill replaces the current school report card system with a school review system created and implemented by DPI and the ARB. It also replaces the current set of corrective measures for low performing schools with a set of sanctions.

CURRENT LAW

Accountability and Public Schools

Accountability Index and Report Cards

Beginning in the 2011-12 school year, DPI implemented an accountability index under the authority of a waiver from the federal Elementary and Secondary Education Act (ESEA, commonly known as "No Child Left Behind") ("the waiver"). The index measures schools and districts' performance on multiple measures of performance, based on data from the previous school year. Using this information, annual report cards rate schools and districts in one of five performance categories: (a) significantly exceeds expectations; (b) exceeds expectations; (c) meets expectations; (d) meets few expectations; or (e) fails to meet expectations.

Under the waiver, the measures of performance for schools and districts are:

- Student achievement;
- Student growth;
- Closing achievement gaps; and

- On-track to graduation and postsecondary readiness.

Scores are provided in each of these areas and may be reduced for failing to meet minimum expectations in the following areas: test participation; dropout rates; and absenteeism. The waiver requires support and intervention for the state's low performing schools and recognition and rewards for high performing schools.¹

Low Performing Schools

Current statutes require the State Superintendent of Public Instruction (State Superintendent) to annually identify low performing schools and districts, and make recommendations for improving them. [s. 115.38 (4), Stats.] The statutes also specify actions that the school board must take if the State Superintendent determines that a district or a school is in need of improvement for four consecutive school years, or that a school is one of the lowest performing in the state. The measures used for these determinations are based on ESEA (No Child Left Behind) requirements. As discussed above, Wisconsin has received a waiver from these requirements beginning with the 2011-12 school year.

Low Performing School District for Four Consecutive School Years

If the State Superintendent determines that a school district has been in need of improvement for four consecutive school years, the school board **must** take certain actions including curriculum changes, implementation of differentiated instruction, and various supports and interventions.²

In addition to the above mandatory actions, the State Superintendent **may** make certain directives to the school board in a school district in need of improvement for four consecutive school years, **after** consulting with the school board, the school district superintendent, and representatives of each labor organization representing school district employees. These permissible directives include implementing a new or modified instructional design, and implementing changes in administrative and personnel structure.³

Low Performing School in a Low Performing School District

If the State Superintendent determines that a public school was in the lowest performing five percent of all public schools in the state in the previous school year **and** is located in a school district that has been in need of improvement for four consecutive school years, the school board **must** implement specific actions including:⁴

- Implementing performance evaluation systems for teachers and principals.

¹ For more complete information on the waiver, see http://acct.dpi.wi.gov/acct_accountability.

² For the complete list of actions required by statute, see s. 118.42 (1), Stats.

³ For the complete list of actions permitted by statute, see s. 118.42 (3) (a), Stats.

⁴ For the complete list of actions required by statute, see s. 118.42 (2), Stats.

- Evaluating the equitableness in distribution of teachers and principals within the affected schools relative to the distribution of teachers and principals throughout the school district, based upon their qualifications and effectiveness.
- Performing certain corrective actions if the distribution of teachers and principals in the district is found inequitable.
- Providing specified professional development and teacher and principal improvement programs.

In addition to the above mandatory actions, the State Superintendent **may** make certain directives to the school board of a school that is located in a district that has been in need of improvement for four consecutive school years, if the school: (a) was among the lowest performing five percent of all public schools in the state the previous year; or (b) has been in need of improvement for five consecutive school years. These directives may be made only **after** consulting with the school board, the school district superintendent, and representatives of each labor organization representing school district employees. These permissible directives include implementing a new or modified instructional design, and creating a school improvement council.

Priority Schools and Focus Schools

The waiver also requires DPI to identify two types of Title I schools.⁵ The lowest five percent of Title I schools in the state in reading and mathematics performance are identified as "priority schools," while the 10% with the lowest average subgroup performance or the largest average subgroup gaps in reading, mathematics, or graduation rate are identified as "focus schools." These group identifications are not listed on the school report cards. The waiver requires that priority schools and focus schools receive additional training, professional development, and resources designed to improve student outcomes for subgroups of disadvantaged students.

Accountability and Charter Schools

The discussion above regarding public schools also applies to independent, non-instrumentality charter schools, such as those established by the City of Milwaukee and the University of Wisconsin (UW)-Parkside. They are considered to be public schools for purposes of federal law relating to accountability and measuring progress.

These charter schools will be phased into the student information system for the standardized collection of student data in the 2015-16 school year. Current law requires DPI to begin giving annual report cards to charter schools one year after they begin collecting this student data.

⁵ Title I is a federal program that provides funding to schools and districts with high percentages or high numbers of disadvantaged children. [20 U.S.C. 6301 *et seq.*]

Accountability and Choice Schools

Private schools that participate in a parental choice program under the Milwaukee, Racine, or statewide programs ("choice schools") are not generally subject to the laws that apply to public schools, but their participation in the choice program is conditioned upon their compliance with laws relating to private schools and to schools participating in the choice program.

Choice schools will be phased into the student information system for the standardized collection of student data in the 2015-16 school year. Current law requires DPI to begin giving annual report cards to choice schools one year after they begin collecting this student data.

Current law allows the State Superintendent to issue an order barring a private school from participating in the choice program in the current school year if he or she determines that the private school has made certain kinds of misrepresentations or reporting violations specified in statute. A private school can likewise be banned in the current school year for failure to meet at least one of the following standards by the date specified by DPI by rule:

- At least 70% of the choice students advance one grade level each year.
- The private school's average attendance rate for the choice students is at least 90%.
- At least 80% of the choice students demonstrate significant academic progress.
- At least 70% of the families of choice students meet parent involvement criteria established by the private school.

Grounds to bar a private school from the choice program in the current school year also include failure to comply with other requirements related to tracking indicators of academic achievement, such as administering the third grade reading test to students (if any) attending third grade under the choice program.

2015 ASSEMBLY BILL 1

Academic Review Board

The bill creates an ARB to advise DPI on the implementation, evaluation, and improvement of a new school review system. The bill directs the ARB to develop incentives for exceptional schools, schools with a significant population of children at risk, schools offering technical education programming, and schools eligible for career and technical education grants. The bill directs the ARB to promulgate rules governing consequences for failing schools, methods for evaluating school data collection, and criteria to grade schools. ARB is also to oversee the process of approval for optional alternative standardized tests.

When a school becomes subject to sanctions under the new school review system, the ARB provides an alternative improvement plan for use by the school. The board also decides whether to approve any bids to convert a public school subject to sanctions into an independent charter. If the board approves any such bids, the board also serves as the charter authorizer.

Under the bill, the ARB is a distinct unit of DPI exercising independent powers, but the State Superintendent directs the budgeting, program coordination, and related management functions. The ARB's members are to be:

- The State Superintendent or his or her designee.
- Six nominees of the State Superintendent as follows: a principal of a public school; a representative of a college or university in the UW System; an individual employed as instructional staff at an independent charter school; an administrator of a choice school; a teacher at a choice school; and a representative of a Wisconsin technical college.
- Two nominees of the Governor, one of whom must be a representative of a Wisconsin private college or university.
- One nominee of the Assembly Minority Leader, who must be a principal of an independent charter school.
- One nominee of the Speaker of the Assembly.
- One nominee of the Senate Minority Leader, who must be a teacher employed by a school district.
- One nominee of the Senate Majority Leader.

Nonvoting, advisory members may be also appointed by the ARB.

Authority of the Board

You have asked whether the authority exercised by the ARB could be ruled unconstitutional by a court if this bill becomes law and the ARB is challenged as usurping the power of the State Superintendent. The law in this area is somewhat unsettled. As described below, it is not possible to state with certainty whether the provisions of the bill are unconstitutional with respect to the State Superintendent.

As you know, in Wisconsin, the Office of the State Superintendent of Public Instruction is a constitutional office. Wisconsin Constitution, Article X, Section 1, provides:

The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law. The state superintendent shall be chosen by the qualified electors of the state at the same time and in the same manner as members of the supreme court, and shall hold office for 4 years from the succeeding first Monday in July. The term of office, time and manner of electing or appointing all other officers of supervision of public instruction shall be fixed by law.

The meaning of the above provision was analyzed by the Wisconsin Supreme Court in *Thompson v. Craney*. In that case, the State Superintendent challenged a law that created a state Education Commission, a state Department of Education, and the position of state Secretary of Education. Under the law, the State Superintendent was the chair and a member of the Education Commission. The Court concluded that the law "unconstitutionally [gave] the former powers of the elected State Superintendent of Public Instruction to appointed 'other officers at the state level who are not subordinate to the superintendent.'" [199 Wis. 2d 674, 678, 546 N.W.2d 123 (1996).]

In the case, the Court reviewed the statements of delegates to the Constitutional Convention and found that there were two consistent themes regarding the above provision: "first, that the system of education required uniformity; second, that the [State Superintendent] was to provide this uniformity in an active manner by implementing the system of education." [*Id.* at 688-689.] In that case, the Court also interpreted the "other officers" reference to mean local officials who are subordinate to the State Superintendent. [*Id.* at 698.]

Regarding whether the Legislature may reduce the powers of the State Superintendent, the Court stated:

Under our holding in the present case, the legislature may not give equal or superior authority to any "other officer." This case does not require us to decide the extent to which the [State Superintendent's] powers may be reduced by the legislature, and we reserve judgment on that issue. [*Id.* at 699-700.]

In another case, however, the Court held, "Because the constitution explicitly authorized the legislature to set the powers and duties of public instruction officers, Article X, sec. 1 confers no more authority on these officers than that delineated by statute." [*Arbitration between West Salem & Fortney*, 108 Wis. 2d 167, 182 (1982).]

The relevant question a court would analyze with regard to the Wisconsin Constitution is whether the provisions of this bill creating the ARB give powers of the State Superintendent to other officers who are equal or superior to the State Superintendent. The Court would analyze whether the State Superintendent retains the authority to determine the outcome of the board's work. If the board's role is largely advisory in nature, there is an argument that the board members remain subordinate to the State Superintendent and do not have powers that are currently held by the State Superintendent.

On the other hand, this bill grants the board certain duties, such as exercising independent rulemaking authority, that contemplate a role beyond advising DPI. Because of these aspects of the board's role, a court could hold that the State Superintendent's supervisory power is compromised to the point of an unconstitutional transfer of State Superintendent powers to other officers.

School Review System

School Review Reports and Grades

The bill directs the ARB to create by rule a school review system to replace the current accountability system. The bill specifies the criteria the system will use to measure schools and districts' performance on various achievement indicators, based on data collected through the student information system. For public schools, the first report will come from data collected in 2015-16 school year. For independent charter schools and choice schools, the first report will come from data collected in the 2016-17 school year. Using this information, annual review reports will grade schools and districts in one of five performance categories: A, B, C, D, or F.

Under the bill, the required measures of performance for schools and districts are:

- Student achievement;
- Student growth;
- Closing achievement gaps; and
- Rates of attendance or of high school graduation (to include a measure of improvement as well as a measure of attainment.)

The bill requires DPI to measure these criteria to evaluate student performance, and to determine the appropriate weight of these measures in calculation of the performance grades.

Choice Pupil Grade Option

Under the school review system created by the bill, choice schools are not required to submit data about students who are not attending under the choice program. If a choice school chooses to submit such data, it may opt to receive two grades: one for the choice students (students attending under the parental choice program) and one for all other students attending the school. If the school receives a "choice pupil grade," only this grade may become the basis of sanctions in the new school review system.

Schools Not Receiving a Grade

Under the bill, the following schools will receive a rating of "satisfactory" or "needs improvement," instead of a grade:

- Schools for which DPI finds there is insufficient data available to calculate a grade.
- Schools for which DPI finds that a grade is inappropriate because the schools' mission is to serve mostly or only at-risk students, students with disabilities, or students with special needs who require accommodations in order to take standardized assessments.

If a choice school with fewer than 20 choice students utilizes an alternative test as described below, it may direct DPI to display on the review report the percentile rank of test scores instead of a school grade.

Standardized Assessments

Current Law

The current accountability system and the student review system created under the bill both give weight to student academic achievement as measured by scores on standardized assessments. Current law requires the State Superintendent to develop an educational assessment program to objectively measure the adequacy and efficiency of educational programs offered by public schools. The assessment program must measure pupil achievement in reading, mathematics, writing, science, social science, and other areas of instruction commonly offered by public schools. The statutes require that assessments must be conducted at several grade levels on a uniform, statewide basis. [s. 115.28 (10), Stats.]

Beginning in the 2014-15 school year, standardized tests administered statewide are shifting from the Wisconsin Knowledge and Concepts Examination (WKCE) to new assessments measuring mastery of the Common Core State Standards (CCSS). This change to Smarter Balanced assessments aligned with the CCSS was mandated in a nonstatutory provision of the 2011-13 Biennial Budget Act. [SEC. 9137, Wisconsin Act 32.]

Assembly Bill 1

Under the bill, a school can elect to administer alternative standardized tests approved by the ARB, in place of the state standardized assessments, and receive a grade based on the alternative test scores. The bill requires ARB to work with the Value Added Research Center (VARC) at UW-Madison to evaluate and approve three tests acceptable for statistical comparison with the statewide standardized assessments. The ARB then provides the list of approved tests to DPI, which must publish the list. The bill directs VARC to statistically equate the scores from any alternative test administrations so that DPI can use the data to assign grades under the school review system. If a school opts for alternative tests, it pays the costs of administration.

The bill also gives the ARB authority to approve additional alternative tests for administration by schools applying through a procedure established by the board. If ARB considers such applications, it may only approve additional tests that, according to VARC, align sufficiently with content standards established for the current statewide standardized assessment, and that meet other reliability requirements.

Alternative Tests and Public Schools' Federal Obligations

You have asked whether there may be federal law implications if public schools elect to administer alternative tests as provided under the bill. As noted above, Wisconsin's current accountability system is part of the state's agreement with the federal government under its waiver from ESEA ("No Child Left Behind"). The waiver conditions require the state to report academic achievement on standardized assessments for benchmarking progress against national and international standards. To do this, all public schools must administer the same assessment statewide. This also applies to independent, noninstrumentality charter schools,

which are considered to be public schools for purposes of federal law relating to accountability and measuring progress.

Allowing public schools, including charters, to administer alternative assessments in lieu of the statewide assessment would require Wisconsin to apply to the U.S. Department of Education for a waiver modification. The federal agency does not grant preapprovals for such modifications and it is unknown what the result of such a request would be, or how long it could take to be decided.

Sanctions for Low Performing Schools

The bill puts in place sanctions for schools that receive a grade of D or F starting with their third school review report under the new system. The Step I sanctions and Step II sanctions are outlined below. Under the bill, the ARB provides an annual review to any school subject to sanctions to check for progress toward improvement goals.

Step I Sanctions: Timing

A public school will first become eligible for sanctions upon receiving its fall 2018 report (based on 2017-18 data). If the school receives a D or an F on this report or any subsequent report, it is subject to Step I sanctions.

An independent charter school or a choice school with at least 20 choice students will first become eligible for sanctions upon receiving its fall 2019 report (based on 2018-19 data). If the school receives a D or an F on this report or any subsequent report, it is subject to Step I sanctions.

Step I Sanctions: Consequences

A public school or independent charter school that becomes subject to Step I sanctions has two choices: (1) develop and implement a reform plan and adhere to it for four school years; (2) implement an alternative improvement plan approved by the ARB for four school years.

If a public school subject to Step I sanctions is designated a focus school or a priority school (see p. 3 of this memorandum) at the time it enters sanctions, it must comply with any associated requirements at the end of the four year sanction period if those requirements have not already been satisfied.

A choice school that becomes subject to Step I sanctions has four choices: (1) or (2) above; or (3) take no new choice students for two years, with the option to reapply if it complies with one of the first two choices; or (4) withdraw from the choice program, which bars its participation for four years.

Step II Sanctions: Timing

If the ARB determines that a school has failed to make adequate progress toward its goals under a reform plan or improvement plan after four years in Step I sanctions, the school becomes subject to Step II sanctions.

Step II Sanctions: Consequences

For a public school, DPI must publish a Request For Proposals to make the school an independent charter school under the authority of the ARB. The board reviews all proposals, and authorizes or rejects them. If the ARB does not accept any proposal, the school board must sponsor the new charter under s. 118.40 (2m), Stats.

For an independent charter school, DPI must stop payments to the school as soon as practicable under the terms of the contract.

For a choice school, DPI must stop payments to the school as soon as practicable. The school cannot accept new choice students for four years; after four years it can reapply for participation in a choice program if it complies with an improvement plan.

Exiting Sanctions

The State Superintendent, with the advice of the ARB, can release a school from sanctions if: (a) it has demonstrated measurable progress in the four years after entering sanctions; or (b) it is on a trajectory to meet the goals of its improvement plan within the six years after entering sanctions.

ARB Review of School Review System

The bill requires the ARB to perform a review of the school review system after the first four years, and once every two years thereafter.

Other Provisions

The bill requires each school board to inform parents or guardians of children ages 3-18 in the district of the educational options available to such children.

The bill also requires DPI to collect and disseminate best practices from schools, except that a choice school must give consent before DPI may collect its information for this purpose.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

JO:ksm